IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.1566 OF 2005

1. Jamatul Muslimen Tandel Masjid Trust and ors. .. Appellants.

vs

1. Shri Ekhlaskhan Ahmadekhan and ors. .. Respondents.

Mr Nitin Jamdar, for the appellants.

Mr V.S.Gokhale, for respondent no.1.

CORAM : D.B.BHOSALE,J.
DATE : 12/03/2007

PC:

1. Heard Mr Jamdar, learned counsel for the appellants and Mr Gokhale, learned counsel for respondent no.1. None appears for other respondents, though served. Admit. Mr Gokhale, learned counsel, waives service for respondent no.1. Notice to the respondents was issued for final disposal at the stage of admission. Hence, by consent of the learned counsel for the parties, the appeal is taken up for final disposal and heard.

2. This appeal is directed against the concurrent judgments of the courts below, by which a preliminary objection raised by the defendants as to the

jurisdiction of the court has been upheld. The appellants-plaintiffs in their Regular Civil Suit No.2380 of 2000 made the following prayers :

> "(a) That the defendant nos 1 to 4 and 6 and 7 may kindly be directed to vacate the suit premises and hand over the vacant and peaceful possession of the suit property to the plaintiffs and decree may be drawn accordingly.
>
> (b) The defendant nos 1 to 4, 6 and 7 may be ordered by an order of mandatory injunction to remove the unauthorised suit shed and decree may kindly be drawn accordingly. If the defendant nos 1 to 4, 6 and 7 failed to deliver the possession and to demolish and take away the suit shed structures, the same may kindly be removed through Court by appointing Commissioner.
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> (c) The mesne profits be given to the plaintiffs from the defendant nos 1 to 4, 6 and 7 as the court deems fit in the interest of justice.
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> (d) The costs of this suit be awarded to the plaintiffs from defendant nos 1 to 4, 6 and 7.
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> (e) Any other just and equitable orders may be passed in the interest of justice."

No relief whatsoever was sought against defendant no.5. The facts, as set out in the plaint, in short, demonstrate that defendant no.5 was a tenant in the suit premises. The suit premises, situate at Pune, within the limits of Pune Cantonment Board known as Sachapeer Kabarstan, admeasuring about 8178 sq.ft and the tin shed with iron shutters. Each tin partition wall admeasures 46.8‘ x 21‘. The plaintiffs claim to be the owners of

the suit premises and, according to them, defendant nos 1 to 4, 6 and 7 have no right, title and interest in the suit premises and they are trespassers. According to the plaintiff-Trust, defendant no.1 took forcible possession of the suit premises from defendant no.5 and constructed the tin shed and inducted other defendants in the suit premises. As against this, the case set up by defendant nos 1 to 4, 6 and 7 is that defendant no.5 has no right in the suit premises and they are the tenants since prior to 1981 and that they pay Rs.1000/- as monthly rent. They further contend that there exists relationship of landlord and tenant between the plaintiffs and them and, therefore, in view of section 28 of the Bombay Rent Act, the civil court has no jurisdiction to try the suit. A reference to the suit between defendant no.1 and defendant no.5 was also made in which his claim being tenant had been accepted by the court. Admittedly, the plaintiffs-landlord were not party in the said suit.

3. Against the backdrop of these facts, a suit for possession was instituted with the aforesaid prayers. The courts below seem to have upheld the objection as to the jurisdiction raised by the defendants on the basis of their case set up in the written statement that they are the tenants in the suit property. It would be

advantageous to reproduce the reasons recorded in paragraphs 8 and 9 of the impugned judgement of the appellate court for better understanding of the grounds on which the objection regarding jurisdiction of the civil court was upheld by the courts below. Paragraphs 8 and 9 in the appellate court judgments read thus:

> "(8) It is stated in the plaint para no.6 that defendant no.5 is a tenant of the plaintiff trust in the suit property, i.e. one room east admeasuring 10 ft x 15 ft. It is submitted on behalf of the appellants that defendant no.1 has forcibly dispossessed defendant no.5 and trespassed upon the suit property belonging to the trust. Hence, it is the fact on record that the plaintiff trust wanted the possession of the property which was let out to the tenant may be defendant no.5. It is submitted on behalf of the appellants that as the plaintiff trust is claiming possession of the suit property alleging that the defendants except defendant no.5 is a trespasser, Civil Court has jurisdiction. However, at the same time the plaintiffs have pleaded that defendant no.5 is a tenant of the plaintiff trust in the suit property. In para no.6 of the written statement there is such pleading.
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> (9) It is submitted on behalf of respondent no.1 that previously present defendant no.1 had instituted a suit bearing Regular Civil Suit No.304/1991 against present defendant no.5 for perpetual injunction and the Court has delivered the judgment in the said suit dated 31.3.1997 restraining defendant no.5 to disturb the possession of the present defendant no.1 over the property described in the plaint in Regular Civil Suit No.304/1991. The learned Advocate of respondent no.1 has referred the finding given in Regular Civil Suit No.304/1991 and the issues therein. There is a issue in the said

proceeding, "whether the plaintiff is a tenant in the suit property?" and the finding is given in Regular Civil Suit No.304/1991 in favour of the present defendant no.1 that he is the tenant in the premises. Nothing is shown that the said order is challenged by any of the party. The record also discloses that present defendant no.5. had instituted a suit bearing Regular Civil Suit No.143 of 1992 and the said suit is decided against the present defendant no.1 and the Trust and the said proceeding is dismissed by the trial Court. The learned Advocate of present respondent no.1 also referred the said judgments and the issues and findings therein. There is a issue in the above suit bearing Regular Civil Suit No.143/1992, whether the suit property is let out by defendant no.1 mens the Trust to the plaintiff means present defendant no.5 and the finding is given in the negative. The trust was the party in the said proceeding. Nothing is shown that the said finding is challenged by any of the party. When the Court held while deciding Regular Civil Suit No.143/1991 that present defendant no.1 is a tenant of the suit property also seems to be taken into consideration by the trial Court. As per section 26 of the Provincial Small Causes Courts Act, 1887 the suits or proceedings between the licensor and licensees or landlords and tenants for recovery of possession of immovable property etc are required to lie in the court of Small Causes. It is submitted that the Small Causes Court is functioning at Pune. The trial Court has considered the previous history and the findings given by the competent court in the suits between defendant no.1 and defendant no.5 and came to the conclusion that the civil court has no jurisdiction to try the present suit. The finding given by the trial court is based upon the history and the previous litigations referred above and as the small causes court is functioning at Pune the said observation is not required any interference at the hands of this court. Moreover, assuming for the sake of argument that the possession of defendant no.1 is of the trespassers but even though as the plaintiff is claiming that initially defendant no.5 was the tenant and defendant no.1 dispossessed defendant no.5 and as such he is the trespasser and as the plaintiff has claimed the possession of the tenanted premises, the civil court has no

> jurisdiction.Hence, no interference is warranted at the hands of this court to the finding given by the trial court in the impugned judgment and order. Hence above point nos 1 and 2 are answered in the negative".

From bare perusal of the reasons recorded by the appellate court, it is clear that the objection regarding jurisdiction has been upheld on the basis of the stand taken by defendant no.1 that he is a tenant in the suit premises which, in my opinion, is not correct and cannot be sustained in law. The jurisdiction of the civil court will have to be decided on the basis of the averments/allegations in the plaint and not on the basis of the defence taken by the defendants in the suit. Mr Gokhale, learned counsel for the respondent, could not and did not dispute that the allegations made in the plaint would decide the forum. On a reading of the plaint as a whole it is evident that the appellants-plaintiffs had filed the suit giving rise to the present appeal treating the defendants as trespassers. A suit against the trespassers, in my opinion, would lie only in the civil court and not in the Rent Court. It is true that in this suit, the defendants have all the defences open, which court will have to consider while dealing with the case of the plaintiff. Insofar as defendant no.5 is concerned, I am informed that he did not appear before the courts below

and even if he appears in the case and claims that his tenancy in the suit premises still subsists, the plaintiffs have not made any prayer against defendant no.5. However, I have doubt whether defendant no.5 can now appear in the present proceedings and take such stand in view of the judgment in Regular Civil Suit No.143 of 1992, wherein the appropriate court has recorded a negative finding in respect of his tenancy in the suit premises. In the circumstances, this appeal is allowed. The impugned judgments are set aside. The trial Court shall proceed with the hearing of the suit and dispose of the same as expeditiously as possible and preferably within a period of one year from the date of receipt of this order. All contentions on merits are kept open. No order as to cost.

(D.B.BHOSALE,J.)